United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

75-7254

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

THE STATE OF NEW YORK,

Plaintiff-Appellant,

-against-

DANNY WHITE, PAUL WHITE, JR., PAUL WHITE and NORMA WHITE, his wife, LORRAINE MONTOUR, THOMAS DELARANDE and LORRAINE DELARANDE, his wife, JOHN HEMLOCK, ALLEN HEMLOCK, DIANE HEMLOCK, EARL FRANCIS CROSS, CHRISTOPHER HEMLOCK, ANGUS DEER, DAVID DEER, DAVID DEERHOUSE, WARREN DEER, JIMMY DEER, PAUL WILLIAMS, ALEX AKWIENZIE, TOM COOK, DOUGLAS PINE, ANNIE JOCK, "JOHN" GAMBLE, first name John being fictitious, real first name not being known to plaintiff, person intended being in possession of State land in Town of Webb, Herkimer County; "JOHN DOE", "RICHARD ROE", "RITA ROE", "GERALD GOE", "JANE COE", "SAM FOE","GLADYS HOE", "AL JOE", "JANE DOE", "SUE WOE", "PETER MOE", "PHILIP SOE", "CAROL ZOE", "DONALD POE", "FRED MOE", "BOB BOE", "WARREN KOE", "BILL VOE", and "JOE WOE", true names of parties being unknown, parties intended being in possession of State land in the Town of Webb, Herkimer County,

Defendants-Appellees.

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P/S

Docket No.
75-7254

BRIEF FOR PLAINTIFF-APPELLANT

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Statement

This is an appeal by the State of New York from a judgment of the United States District Court for the Northern District of New York (PORT, J.) dismissing the complaint and denying plaintiff's motion for summary judgment. The complaint was dismissed for lack of subject matter jurisdiction. The motions for intervention

made by Douglas L. Bennett, Bonnie L. Bennett, Big Moose Property Owners Association and the Town of Webb* were also denied.

Question Presented

Should the District Court have dismissed the complaint for lack of a federal question when the facts indicated the following:

(a) Defendants (Indians) issued a manifesto which impugned the State's title to a specific parcel of land and all other lands in the northeastern part of New York State;

(b) A number of owners of land in the area and the Town of Webb sought to intervene because the manifesto affected their property rights;

(c) The defendants, as a basis for their manifesto, attack the validity of treaties made by New York State with the Mohawk Indians;

(d) The defendants contended that no court situate in the United States, federal or state, had jurisdiction to determine the validity of these treaties because there was involved a dispute between sovereigns?

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* Douglas L. Bennett, Bonnie L. Bennett, and Big Moose Property Owners Association have filed an appeal from the denial of their motion to intervene.

Facts

The State of New York acquired title by deed recorded in Herkimer County Clerk's office in Book 629 of Deeds at page 672 to 612.7 acres of land in Township 8, John Brown's Tract, Town of Webb, Herkimer County, by purchase from Nature Conservancy for the sum of $783,000 (Exh. I attached to Complaint [10, 11]).* Upon acquisition of these lands by the State on August 7, 1973, the lands became part of the New York State Forest Preserve. The defendants took possession of the lands, occupying the buildings located thereon on or about June 1, 1974 (1, 5).

The defendants claim that as Mohawk Indians and as members of the Six Nation Confederacy they have an absolute right to occupy the lands for the alleged reasons that the Mohawk Indians, the original inhabitants of this property and of most of north-eastern New York are the owners of it and have never lawfully ceded their rights in this property to the State of New York.

The complaint in this action (11-22) was filed in the Clerk's Office of the United States District Court for the Northern District of New York on September 11, 1974.

The complaint alleges that the defendants illegally occupy the aforesaid premises owned by the State. It alleges the following as to the United States Court's jurisdiction (1):

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* Numerical references are to pages in the Appendix.

"3. Jurisdiction is founded on 28 U.S.C. 1331(a), and the matter in controversy exceeds, exclusive of interest and costs, the sum of $10,000.

"4. This action is brought pursuant to 28 U.S.C. 2201 and 2202 and Fed. Rules Civ. Proc. rule 65, 28 U.S.C. to remove a cloud on title to the hereinafter described premises and to declare title to the same in the plaintiff and to secure possession from the defendants and to keep defendants from reentering the premises."

The complaint sets forth a complete chain of title commencing with a deed to Carolyn S. Longstaff, dated August 24, 1920 and recorded October 2, 1920, in Book 251 of Deeds at page 7, in the County Clerk's Office of Herkimer County, and terminating with the aforementioned deed to the State of New York (3).* The complaint further alleges that two former owners, George H. Longstaff and Robert F. and Jane N. Rider had occupied the premises continuously as a camp for children for a period of more than twenty years (3).

The defendants herein at the time they went into possession of the property circulated what they call the "Ganienkeh Manifesto". The Manifesto is undated and states that it was compiled by Louis Hall, Secretary, Caughnaua Branch, Six Nations Confederation. It says that the Mohawk lands were lost "in an earlier century by

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* Certified copies of the title papers, including abstract of title and continuations, and certified copies of all deeds recorded within the last forty years were presented to the Court on the argument and are the plaintiff's exhibits in this case.

fraud" and that the possession of those lands by New York State and Vermont is an illegal usurpation. It further states that no deed* signed by Joseph Brant** is valid and that no indian nor any individual nation of the Six Nations Confederacy had the right to sell any lands without the consent of the Grand Council of the Six Nations. It also attacks the validity of the Treaty of 1797*** made by the Mohawk Nation with the State of New York, which treaty released to the people of the State of New York all Mohawk lands within the State.

This Ganienkeh Manifesto constitutes a cloud on the State's title and necessitates the declaration of the validity of the State's ownership.

The Manifesto not only is a cloud on title to the 612.7 acres described in the complaint but to all of northeastern New York and parts of neighboring states. This cloud has affected the property rights of Douglas L. Bennett, Bonnie L. Bennett, Big Moose Property Owners Association and the Town of Webb and because of this, they sought to intervene in the action (48, et seq., 63, et seq.).

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* The word deed in the Manifesto apparently refers to the treaty which ceded all Mohawk land rights in New York State to the State.

** Joseph Brant was a chief of the Mohawk Indians and was one of the signers of the treaty for the Mohawk Indians.

*** This is the same Treaty that was proclaimed April 27, 1798 referred to in the complaint.

The Mohawk Indians sided with the British in the Revolutionary War and after the termination of the war, fearing reprisals by the victors, the Mohawks moved to Canada and later petitioned the British Crown and received a grant of lands in Grand Valley, Ontario, Canada, which became their headquarters (5, 6).

The owners of all lands in that portion of northeastern New York derived their title through a treaty proclaimed April 27, 1798 (22), made by New York State with the Mohawk Nation in conformity with the Indian Non-Intercourse Act, now 25 U.S.C. [Indians], § 177*. This law provided that treaties between States and Indians be made in the presence of and with the approval of a United States Commissioner or Commissioners. The complaint recites that the treaty of April 27, 1798, was made "in the presence of and with the approbation" of Honorable Isaac Smith the Indian Commissioner appointed by the United States as required by the Indian Non-Intercourse Act. By this treaty the Mohawk Nation ceded all their right to any property in New York State. The treaty contains the following (22):

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* Section 177 is now substantially the same as 1 Stat. 329 in existence in 1793.

> "And the said agents do accordingly, for and in the name of the people of the state of New York, pay the said three several sums to the said deputies, in the presence of the said commissioner. And the said deputies do agree to cede and release, and these presents witness, that they accordingly do, for and in the name of the said nation, in consideration of the said compensation, cede and release to the people of the state of New York, forever, all the right or title of the said nation to lands within the said state: and the claim of the said nation to lands within the said state, is hereby wholly and finally extinguished."

A prior treaty was made with the Seven Nations or Tribes of Indians of Canada (this included the Mohawks who then lived in Canada), on May 31, 1796. By this treaty the Canadian Indians, including the St. Regis Indians (part of the Mohawk Nation) ceded to New York State "All the Claim Right or Title of them the said Seven Nations or Tribes of Indians to Lands within the said State."*

The Ganienkeh Manifesto attacks the validity of both the treaty of April 27, 1798 and the treaty of May 31, 1796. At no time after the making of these treaties up until the present occupation did the Mohawk Indians or anyone claiming through them assert any right to any of the lands that the Mohawks formerly owned in the State of New York except the one square mile occupied by the St. Regis Indians.

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* The treaty also granted to the St. Regis Indians one square mile of territory on the Grass River not part of the lands involved in this suit.

Defendants' Motion to Dismiss (28)

The motion to dismiss was made by defendants apparently under Rule 12 of the Federal Rules of Civil Procedure, and sought to dismiss the action upon three grounds (28):

(a) that it is a dispute between two nations, each sovereign;

(b) that it involves the validity of treaties entered into by the Executive Branch of the government and is not open for determination by Congress; and

(c) that the question of ownership of sovereign lands of "governments" is in effect an action against the Mohawk Nation, and is therefore barred by the doctrine of sovereign immunity.

State's Motion for Summary Judgment (92-93)

The State's motion was made pursuant to Rule 12(b) and Rule 56 of the Federal Rules of Civil Procedure. Under Rule 12(b) a motion to dismiss may be treated as a motion for summary judgment if matter outside the complaint is used. Defendants' motion to dismiss contains such matter. Under Rule 56, a party may cross-move for summary judgment if the adverse party has moved for summary judgment. The plaintiff cross-moved for summary judgment because its rights are based upon documents, treaties and historical references which have not been disputed.

Memorandum Decision and Order (108-122)

In its decision, the Court below noted that (109-110):

> "The plaintiff, pursuant to 28 U.S.C. §§2201 and 2202 and Rule 65 F.R. Civ. P., seeks a judgment declaring the plaintiff to be the owner in fee of the subject premises, and injunctive relief granting possession of the premises to the plaintiff and restraining the defendants from re-entering the premises. Plain- [sic] seeks further 'a judgment removing, as a cloud on plaintiff's title, the effects of defendants' contention that they are rightfully in possession of the hereinafter described premises'."

The Court stated that the plaintiff is the owner of 612 acres in Herkimer County having purchased the land from Nature Conservancy in 1973 for $783,000 and that the predecessor in title of Nature Conservancy had occupied the premises for a period of more than 20 years prior to Nature Conservancy's acquisition of the same in 1973; that upon acquisition by the State of New York the land in question became part of the New York State Forest Preserve; and that defendants violated the New York State Constitution and the statutes and rules with respect to the same (110).

The Court noted that defendants claim to be members of the Mohawk Nation and that they assert entitlement to the land pursuant to the "Ganienkeh Manifesto" and then stated (p. 111):

> "the plaintiff alleges that the defendants have not been authorized by the Mohawk Nation or the Iroquois Confederation of Indian Nations to take possession of the lands and further alleges neither the Mohawk Nation nor the Iroquois Confederation have 'any right, title or interest in said occupied lands'."

The Court further noted that the complaint stated that by treaty of April 27, 1798 the Mohawk Nation released to the People of the State of New York all their right to lands within the State and that the treaty was a valid treaty (111), and that the plaintiff is the owner of the land and the defendants' occupancy of the same constitutes a cloud on the title of the State of New York.

The Court then said that the defendants' contention in their motion to dismiss is (p. 112):

> "that the suit is one between sovereign nations, disputing the ownership or sovereignty of land; that it involves a political matter not within the power of the court to adjudicate; and that, being in substance an action against the Mohawk Nation, the doctrine of sovereign immunity applies."

and that (p. 112):

> "Plaintiff contends that the suit is within the jurisdiction of the court, as one arising 'under the Constitution, laws or treaties of the United States', meeting the monetary limitations of 28 U.S.C. §1331(a)."

The Court then said (p. 112):

> "Since I find that the court lacks jurisdiction of the subject matter, although on grounds other than those urged by the defendants, it is unnecessary to discuss either those grounds, or the basis or merits of the summary judgment motion."

The Court further stated (113): "the allegations which seek declaratory judgment and refer to §§ 2201 and 2202 in no way bolster the plaintiff's jurisdictional grounds." It then continued (113-114):

> "Taylor v. Anderson,* whose viability was affirmed as recently as Oneida Indian Nation v. County of Oneida, 414 U.S. 661 (1974) compels a dismissal for lack of jurisdiction under the facts alleged in the complaint.
>
> "The parties address themselves almost exclusively to the question of whether or not the defendants are occupying the land under authority of the Mohawk Nation and the legal consequences of such occupancy. The plaintiff finds support for 'arising under' jurisdiction in Oneida Indian Nation, supra.
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> "I read Oneida Indian Nation differently. Oneida Indian Nation, as I see it, not only supports the motion to dismiss for lack of 'arising under' jurisdiction, but virtually compels it."

The Court then discussed the Oneida Nation case saying (114-115):

> "In Oneida Indian Nation the Supreme Court, as distinguished from the lower courts, found that the plaintiffs in that case, in order to establish their possessory right to the lands in question, needed to rely on the alleged violation of the Non-Intercourse Act set forth in their complaint; the lower courts having determined that the Non-Intercourse Act and its alleged violation arose in a defensive posture in the first instance.
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> "Oneida Indian Nation, however, re-affirmed the criteria by which 'arising under' jurisdiction is tested. It held 'that the complaint in this case asserts a present right to possession under federal law'. It re-affirmed that
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> > for jurisdictional purposes this is not a case where the underlying right or obligation arises only under state law and federal law is merely alleged as a barrier to its effectuation, as was the case in Gully v. First National Bank, 299 U.S. 109 (1936).
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> * * *

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* Taylor v. Anderson, 234 U.S. 74 (1914).

> Nor in sustaining the jurisdiction of the District Court do we disturb the well-pleaded complaint rule of Taylor v. Anderson, supra., and like cases. Here, the right to possession itself is claimed to arise under federal law in the first instance. Allegedly, aboriginal title of an Indian tribe guaranteed by treaty and protected by statute has never been extinguished."

The Court then stated (116-117):

> "Apparently to avoid Taylor v. Anderson, supra, the plaintiff has characterized this as an action to remove a cloud on title, which is an equity action normally reserved for situations where common law ejectment is unavailable to an aggrieved landowner, because the plaintiff is still in possession.
>
> "This does not change the situation of which the plaintiff complains; the defendants have usurped its possession. That being the case, the legal remedy of ejectment lies, but the court is without jurisdiction to grant equitable relief."

Based on the above, the Court dismissed the complaint for lack of jurisdiction without reaching the merits.

Summary of Argument

The District Court dismissed the complaint for failure to establish "Federal subject matter jurisdiction" relying on Taylor v. Anderson, 234 U.S. 74 (1914). Taylor v. Anderson was an ejectment action and is inapposite. The relief sought in the present action is to remove "as a cloud on plaintiff's title, the effects of defendants' contention that they are rightfully in possession of the hereinbefore described premises and declaring

that plaintiff is the owner in fee of said premises and restoring possession of the premises" (Complaint, Appendix p. 8) and that possession of the premises be restored to the plaintiff.

The cloud on title is defendants' assertion that the treaties made between the Mohawk Indians and the State of New York in 1796 and 1798 are void and that the Mohawk Indians are entitled to and have been deprived by fraud of most of northeastern New York. The relief sought by the State depends on the validity of the Indian treaties. These treaties defendants contend are invalid (Defendants' motion to dismiss, Appendix p. 28, et seq.). The question of the validity of Indian treaties is a federal question just as the question of validity of federal statutes is.

In Norton, et al. v. Larney, et al., 266 U.S. 511 (1924), the Supreme Court of the United States held that federal courts had jurisdiction in an action to quiet title where title would be defeated by one construction of a federal statute while supported by the opposite construction. The Supreme Court held that there was this jurisdiction despite the fact that the complaint did not specifically plead a federal statute question as the basis of the action.

Therefore, the federal courts have jurisdiction of the instant case and it should be remanded to the District Court to decide the State's motion for summary judgment on the merits.

ARGUMENT

SINCE THE COURT HAD JURISDICTION TO GRANT THE PLAINTIFF A DECLARATORY JUDGMENT IN A CASE WHICH INVOLVES THE VALIDITY OF TREATIES, THE COMPLAINT SHOULD NOT HAVE BEEN DISMISSED.

The Court below in deciding against the plaintiff stated that the action was basically one of ejectment and that the request for declaratory judgment "in no way bolsters plaintiff's jurisdictional grounds" (113). The answer is that while the complaint seeks to have the plaintiff put in possession of the property involved, this is incidental to the declarations which it seeks, i.e., declaring the plaintiff to be owner in fee of the premises and removing as a cloud on plaintiff's title, the effects of defendants' contention that they are rightfully in possession thereof. Implicit to the declarations sought here is the validity of the treaties made by the State of New York with the Mohawk Indian Nation and the Iroquois Confederation of Indian Nations. The declarations are much more important and more far-reaching.

United States District Courts have been granted jurisdiction in actions for declaratory judgment by 28 U.S.C. § 2201 which now reads, in part, as follows:

> "any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration whether or not further relief is or could be sought."

Section 2202 affords the District Court the right to grant any further proper relief based on a declaratory judgment. Thus, where the Court has jurisdiction, it may issue a declaratory judgment and as part of the declaratory judgment grant the relief of ejectment.

It is the State's contention that the United States District Court has jurisdiction of this case because it arises out of and under treaties made by the United States. Article III, § 2, of the United States Constitution (jurisdiction) reads in part as follows:

> "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;"

The same article of the Constitution gives Congress the right to establish inferior (federal) courts.

Pursuant to these constitutional provisions, Congress enacted Judiciary and Judicial Procedure Code 28 U.S.C. § 1331(a). This section states that the District Courts shall:

> "have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000*, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States."

The term "treaties" as used in both the Constitution and section 1331(a) include Indian treaties made with the United States or pursuant to United States Law (Oneida Nation v. County of Oneida, 414 U.S. 661 [1974]).

The main relief sought in this case is the declaration of the State's title. Defendants have taken possession of the State's

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* The premises wrongfully occupied by defendants were purchased by the State for $783,000. The value of the land claimed under the Ganienkeh Manifesto runs into billions of dollars.

property and have circulated what they call the "Ganienkeh Manifesto." The Ganienkeh Manifesto asserts that the Mohawk Indians were defrauded out of their property in New York State through a wrong committed by Joseph Brant and the New York State agents and that Joseph Brant was disqualified from entering into treaties affecting Mohawk lands on behalf of the Mohawk Indians and, therefore, the Mohawk Nation is still the owner in fee simple of these lands in New York State. The defendants claim the right to possession of the specific lands described in the complaint and also to all of northeastern New York and portions of the neighboring states. (See paragraph 12 of the complaint [5].) The Ganienkeh Manifesto states that the treaties made by New York State with the Mohawk Indians and through which its title is derived are void. The manifesto contains the following (15):

> "The Mohawk Land was lost in an earlier century by fraud and its possession by New York State and the State of Vermont constitute illegal usurpation. No deed signed by Joseph Brant and the New York State agents can extinguish the rights of the Mohawks to their own country. The native North Americans not only have the rights but are duty bound to CORRECT THE WRONG COMMITTED BY JOSEPH BRANT AND THE NEW YORK STATE AGENTS AGAINST THE MOHAWK NATION. No individual Indian nor any individual Nation of the Six Nations Confederacy has the right to sell or give away land without the consent of the Grand Council of the Six Nations Confederacy. This was one of the findings of the N.Y. Senate investigating commission which ended in 1922.

> "Joseph Brant, who was not even a member of the Six Nations Confederacy, having before disqualified himself, did on March 29, 1797, with an alleged 'power of attorney' make a deal with the New York State in which he gave away all the Mohawk Land to the said New York State. Several months before in November of 1796, the same Jos. Brant with the same 'power of attorney' gave away large tracts of land in Ontario to his British friends. It was called 999 year leases at no cost, that is, no revenue was to accrue. Brant loved the white people so much or was so mesmerized by them, that he pauperized outright, his own people to please his white friends."

The manifesto constitutes an attack on New York State's title the validity of which is based upon federal treaties. The validity of these treaties is a federal question and should be decided by the federal courts (see Oneida Nation v. County of Oneida, 414 U. S. 661 [1974]).

Defendants here did not contend in their motion to dismiss that the relief the State sought was a matter to be decided in a State court but in fact stated that the matters in contention here are international in nature and the treaties made by the Mohawk Indians with the United States or the State were such that no court of the State or of the United States had jurisdiction to decide them.

If they were found by the Court to be correct in their contention and only then, should the complaint have been dismissed. This question was not reached by the Court. The question of whether these treaties involve a federal or international question is properly one for the federal courts and not for the courts of the State of New York.

The Court below relied on the ruling in Taylor v. Anderson, 234 U. S. 74 (1914), an ejectment case where the complaint was dismissed because of lack of a federal question. That dismissal was based upon "the well-pleaded complaint rule". Since the basic relief which the State seeks here is the removal "as a cloud on plaintiff's title, of the effects of defendants' contention that they are rightfully in possession" (Complaint, Appendix p. 8), of the premises by reason of the alleged Mohawk Indian ownership of them, and a declaration* that the State is the owner in fee thereof, and not the ejectment, the Taylor case is not applicable.

Gold-Washing and Water Co. v. Keys, 96 U. S. 199 (1877), was the forerunner to Taylor v. Anderson (supra) and involved the question of federal jurisdiction. There, the Court said (pp. 203-204):

> "Before, therefore, a circuit court can be required to retain a cause under this jurisdiction, it must in some form appear upon the record, by a statement of facts, 'in legal and logical form,' such as is required in good pleading (1 Chit. Pl. 213), that the suit is one which 'really and substantially involves a dispute or controversy' as to a right which depends upon the construction or effect of the Constitution, or some law or treaty of the United States. If these facts sufficiently appear in the pleadings, the petition for removal need not restate them; but, if they do not, the omission must be supplied in some form, either by the petition or otherwise. Under the application of this rule, we think that the record in this case is insufficient and that the Circuit Court did not err in remanding the cause."

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* It should be noted that the applicants for intervention (Douglas L. Bennett, Bonnie L. Bennett, Big Moose Property Owners Association and the Town of Webb) all seek to intervene because of the manifesto issued by defendants which impugns their title to real property and affects other property rights.

It should also be noted that in Gold-Washing and Water Co., the Supreme Court would not limit itself, but stated (p. 204):

> "Under these circumstances, the present case is not to be considered as conclusive upon any question except the one directly involved and decided."

The general rule is that jurisdiction of the court is to be determined by the complaint and that allegations in the complaint made in anticipation of a defense cannot be used to establish the federal question necessary for a request of the court to assume jurisdiction. There are, however, exceptions to this rule. In Fay v. American Cystoscope Makers, Inc., et al., 98 F. Supp. 279 (S.D.N.Y., 1951), the Court held that where a federal forum was made available by Congress in which to litigate a question, the plaintiff was not obliged to do so in the State Court. To reach the federal question, the Court considered matters outside the complaint, saying (p. 280):

> "The normal rule in removal proceedings prohibits the court from looking outside the complaint, to determine whether or not a suit arises under federal law. See, Gully v. First National Bank, 1936, 299 U.S. 109, 113, 57 S.Ct. 96, 81 L.Ed 70. However, where federal jurisdiction hinges on the parties', or one of them, having a particular status, the court may ascertain the existence of that status independently of the complaint."

And continued (p. 281):

> "The suggestion that plaintiff should be permitted to compel defendant to litigate a federal claim in a state court when Congress has explicitly made available a federal forum is indefensible. Motion to remand is denied."

See also Albert B. Ulichny, d/b/a Hotpoint Service v. General Electric Company, et al., 309 F. Supp. 437 (N.D.N.Y., 1970).

The question of the remand of a case from the federal courts to a State court was considered in La Chemise Lacoste v. The Alligator Co., 313 F. Supp. 915 (U.S.D.C., Delaware, 1970). There, the court held that it may go outside of the complaint to determine if there is a federal question and because of this refused to remand the case to the State courts. In La Chemise Lacoste, the Court said (pp. 917-918):

> "Federal jurisdiction exists here for another reason. Although the normal rule requires that federal jurisdiction is established solely by the complaint, Gully v. First National Bank, 299 U.S. 109, 57 S.Ct. 96, 81 L.Ed. 70 (1936), in certain cases where a question of federal status is involved, the Court may look beyond the complaint to establish jurisdiction;
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> * * *
>
> "Nevertheless, the Court held that the real nature of the state claim must govern and not the characterization given by the plaintiff. Likewise, it is the real nature of Lacoste's State claim which must govern here, and on close analysis, it is manifest that it 'really and substantially involves a dispute or controversy respecting the validity, construction, or effect of such a [federal] law, upon which the determination of which the result depends.' Gully, supra, at 114, 57 S.Ct. at 98."

This case came before the District Court again and this time was decided on the merits and relief granted. (See 374 F. Supp. 52 [U.S.D.C., Delaware, 1974].)

In Norton, et al. v. Larney, et al., 266 U. S. 511 (supra), the Court discussed Taylor v. Anderson, saying (p. 513):

> "The bill avers that Larney went into possession of the allotment by authority of treaties between the Creek Nation and the United States and the laws of Congress dealing with the land and individuals of that Nation. We agree with the circuit court of appeals that while this allegation is insufficient to establish jurisdiction, Taylor v. Anderson, 234 U. S. 74; Hull v. Burr, 234 U. S. 712, 720, it sufficiently appears elsewhere in the record that the suit arose under an act of Congress and its solution depended on the construction and effect of that act. On this the circuit court of appeals held the district court had jurisdiction and disposed of the case upon the merits." (Emphasis supplied.)

And at pages 515-516, the Court stated:

> "Upon this state of facts appearing of record, we are of opinion that the circuit court of appeals was right in sustaining the jurisdiction of the trial court. Denny v. Pironi, 141 U. S. 121, 124-125; Robertson v. Cease, 97 U. S. 646, 648; Sun Printing & Publishing Assn. v. Edwards, 194 U. S. 377, 382. It is quite true that the jurisdiction of a federal court must affirmatively and distinctly appear and cannot be helped by presumptions or by argumentative inferences drawn from the pleadings. If it does not thus appear by the allegations of the bill or complaint, the trial court, upon having its attention called to the defect or upon discovering it, must dismiss the case, unless the jurisdictional facts be supplied by amendment. But here no action was taken by that court and none was asked by appellant. Both court and parties proceeded as though the necessary allegations had been made, as they undoubtedly could have been made either originally or, under leave of the trial court, by amendment at any stage of the proceedings, while the record remained under the control of that court. Mexican Central Ry. Co. v. Duthie, 189 U. S. 76, 77-78. And if this court should now reverse the decree and remand the cause, that amendment could still be allowed by the trial court."

It should also be noted that the facts in Norton are analogous to the facts herein. The Norton action was an action to quiet title. The complaint here seeks a judgment removing a cloud on title and therefore is, in essence, an action to quiet title. In Norton there was an allegation that the defendant went into possession of the property in question. There was one here. In Norton there was a contention that plaintiffs' rights arose under the statutes of the United States and defendants' contention that this construction was not required. The Court held that this was a federal question, saying (p. 515):

> "Thus construing the statute, it was and is insisted that the recital in the decision of the commissioner, that the names of the parents of Cheparney Larney appear as 'Big Jack' and 'Bettie' opposite Nos. 8291 and 8292, conclusively establishes that the individual enrolled was the child of the persons identified by these aliases and numbers. On the other hand, the contention of appellees is that no finding of this character is required by the statute and that the recital is, therefore, not conclusive but open to explanation and contradiction. It thus appears that the right set up by appellees would be defeated by the construction of the act as appellants contend; but would be supported by the opposite construction. The case, therefore, in fact is one arising under a law of the United States within the meaning of § 24, subdivision 1, of the Judicial Code."

Here, the plaintiff claims the right to possession under treaties of the United States. The defendants attack the validity of these treaties. The situation thus is the same as that in Norton and there is the federal question which gives the federal court jurisdiction to grant all the relief sought in the instant case.

The federal question in this case is not hypothetical. It has been made on issue raised by the defendants in their motion to dismiss. The motion attacked the validity of the treaties made by New York State with the Mohawk Indians and the determination of the validity of these treaties is necessary before judgment can be reached. Thus, the case involves treaties and a United States District Court has jurisdiction.

It would seem wrong to have the case go to the State court where the defendants would -- as is plain from the grounds of their motion -- deny the validity of these treaties which were made on the authority of the federal government. The validity of these treaties is a federal question. Were the action brought in the State court, the defendants could request removal of the action to a federal court because of this federal question. The ultimate decision as to the validity of the treaties must be made by a federal court. Starting the action again in the State court would result in unnecessary delay and increase the cost of prosecuting this action both for the plaintiff and the defendants.

CONCLUSION

THE JUDGMENT SHOULD BE REVERSED AND THE MATTER REMANDED TO THE DISTRICT COURT FOR DETERMINATION ON THE MERITS, THE QUESTION OF SUMMARY JUDGMENT.

Dated: June 26, 1975

Respectfully submitted,

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Danny White, et al.,
Defendants,

-against-

State of New York,
Appellants.

STATE OF NEW YORK)
COUNTY OF ALBANY) ss.:
CITY OF ALBANY)

Beverly J. Smith, being duly sworn, says:
I am over eighteen years of age and a typist
in the office of the Attorney General of the State of New York, attorney
for the appellant herein.

On the 27th day of June 1975 I served
the annexed brief upon the
attorneys named below, by depositing two copies thereof,
properly enclosed in a sealed, postpaid wrapper, in the letter box
of the Capitol Station post office in the City of Albany, New York,
a depository under the exclusive care and custody of the United States
Post Office Department, directed to the said attorneys at the
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William J. Kogan

WILLIAM J. KOGAN
Notary Public, State of New York
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Beverly J. Smith